Supreme Court, U.S.
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CLERK

NO. 88-2052

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

OCCIDENTAL PETROLEUM CORPORATION
AND THE LONDON UNDERWRITERS, ET AL.
Petitioners

v.

AVONDALE SHIPYARDS, INC.,
OGDEN CORPORATION,
SEABULK TRANSMARINE II, INC.,
HVIDE MARINE INTERNATIONAL, INC.,
AND HVIDE SHIPPING INCORPORATED,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The trial and appellate courts found that the shipbuilder-seller and the independent expert, charged with the supervision of the construction contract, breached their separate warranties of seaworthiness by failing to properly join the tug and barge units of petitioner's vessel, the OXY PRODUCER, a catamaran integrated tug barge, constructed at a contract price of over $34,000,000.00,[1] and that the breach of these warranties resulted in the sinking and total loss of the tug and loss of crew effects on the tug.

Based upon these facts, petitioners submit the following questions:

1. Whether *East River Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) exonerates a provider of professional services from tort liability for the negligent breach of an express warranty which *inter alia*, resulted in loss of "other property."

2. In the case of total loss resulting from the breach of the seller's express warranty of seaworthiness, whether limiting the purchaser's recovery to the physically impossible remedy of "repair and replacement" of defective workmanship violates the pertinent provisions of the Uniform Commercial Code and undermines the uniform application of the Code.

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[1] The capitalized construction and financing cost exceeded $65,000,000.00.

LIST OF PARTIES

Aachener Ruck
Aachener Ruckversicherungs Gesellschaft
Adams & Reese
Ago Schadeverz Mij
Allianz Insurance Co. Ltd.
Allianz International Insurance Co. Ltd.
Alpina Versicherungs Zurich
American Marine Underwriters, Inc.
Americas Insurance Company
Andrew Weir
Andrew Weir Insce Co. Ltd.
Andrew Weir Insco Ltd. SB T A/C.
Ass. Mij de Scoen Provincien
Assce
Assicurazione Generali S p A.
Atlantic Insurance Co.
Atlantic Mutual Insurance Co.
Atlas Assurance Co. Ltd. T A/C.
Avondale Shipyards, Inc.
Avondale Industries, Inc.
Baloise Insce Co., Ltd.
Baltica Scandinavian Insurance Company (UK) Ltd.
Bavarian Re
Bayerische Ruckversicherung A.G.
Brauer & Heye
British Law

British Reserve Ins. Co. Ltd.
Burlingham, Underwood & Lord
Cadwalader, Wickersham & Taft
Chaffe, McCall, Phillips, Toler & Sarpy
Chiyoda Fire & Marine Insurance Company
Commercial Union Assurance Co. Ltd.
Compagnie D' Assce M'imes Aeriennes et Terrestres
Cornhill Insurance Co. Ltd. SV7
Cornhill Insurance Company
Danish Marine Insurance Company Ltd.
Donald H. Miller, Inc.
Drake Insurance Co. Ltd.
Employers Insurance of Wausau
English & American Ins. Co. Ltd. M 2 A/C
English & American Insurance Co. Ml A/C
English & American Insurance Co. Ltd. T A/C
Ennia Schadeverz
Excess Insce
Federal Insurance Co. of New Jersey, New York
Forsakrings-Akticbolaget 'Securitas', Lund
Frankona Ruck
Frankona Ruckversicherungs Aktiengesellschaft
Fred S. James & Co. of New York, Inc.
Gelpi, Sullivan, Carroll & LaBorde
General Electric Credit Corp. of Georgia
Gerling Global
Gerling Globale Ruckversicherung Aktiengesellschaft

Gothaer Trans
Gothaer Transport Und Ruckversicherung
Aktiengesellschaft
Hannover Int. Insurance (NED) N.V.
Hansa Marine Insurance Co. (UK) Ltd.
Hansa Marine Insurance Company (UK) Ltd. S. GP.
Hartford National Bank and Trust Co.
Hill, Betts & Nash
Hudig-Langeveldt
Hvide Marine International, Inc.
Hvide Shipping, Incorporated
Iduna Allgeme
Iduna Allgemeine Versicherung A. G.
Inland Underwriters Insurance Company
Insce Corporation of Ireland Ltd. L A/C.
Insce Corporation Ltd. L A/C
Insurance Corporation of Ireland Ltd.
Insurance Corporation of Ireland Ltd. L A/C.
Iron Trades Ltd.
Iron Trades Mutual Insurance Co. Ltd.
Jauchn Hubener
J.J. Henry Co., Inc.
Jones, Walker, Waechter, Poitevent, Carrere & Denegre
KOA
Kolnishe Ruckversicherungs Gesellschaft
La Preservatrice C A D' Assce - Aird E

La Reunion Francaise Soc Anon D'Assces et Des Reass PL A/C.

Liskow & Lewis

Lloyd's Syndicate Nos. 868, 505, 127, 700, 764, 908, 145, 209, 288, 653, 728, 448, 449, 447, 206, 725

London & Hull Maritime Insurance Co. Ltd.

Lugenbuhl, Burke, Wheaton, Peck and Rankin

Malvern Insurance Co. Ltd.

Malvern Insurance Ltd.

Malverns Insurance

Minster Insce Co. Ltd.

Minster Insce Co. Ltd. 1 A/C

M.U. Cambridge Ins. Co. (U.K.) Ltd.

National Nederlanden Schadeverz

Nordstern

Nordstern Allgemeine Versicherungs Aktiengesellschaft

Northern Assce T A/C

Norwich Union CTY Ltd. Trust A/C

Norwich Union Fire Ins. Socty Ltd. Trust A/C.

Norwich Union Fire Insce Socty Ltd. Trust Z A/C.

Occidental Chemical Agricultural Products, Inc.

Occidental Chemical Corporation

Occidental Petroleum Corporation

Ocean Marine

Ocean Marine Insurance Co. Ltd.

Ogden Corporation
Onsce Co. of (UK) Ltd.
Orion Insurance Co. Ltd. T A/C
Phelps, Dunbar, Marks, Claverie & Sims
Polaris Norske Sjo Insurance Company, Ltd. N A/C
Price Forbes
Provincial Insce Co. Ltd.
Prudential Assce Co. Ltd. Trust A/C.
Prudential Trust
QBE Insurance Ltd.
Reed & Brown, Inc. (now CRB Management, Inc.)
River Thames Insurance Co. Ltd.
Road Transport Insurance Company Ltd.
Rochdale Insurance Company
Rotterdamse Assurantiekas
Royal Insce
Royal Insurance Co. Ltd.
Scottish Lion Insurance Co. Ltd.
Seabulk Tankers, Ltd.
Seabulk Transmarine I, Inc.
Seabulk Transmarine II, Inc.
Seabulk Transmarine III, Inc.
Sedgwich Chartered Hong Kong Ltd.
Sedgwich Marine Ltd.
Seine et Rhone Oceanide Reunies, Parish
Sessions, Fishman, Rosenson, Boisfontaine,
Nathan & Winn
Seven Provinces Insurance Co. Ltd.

Shea & Gould
Societe Commerciale de Reassurance
Southern Marine & Aviation Underwriters, Inc.
Sovereign General Insurance Co. Ltd. SXI
Sovereign Marine & General Insurance Co. Ltd.
Sphere Insce Co. Ltd.
Sphere Insurance Co. Ltd.
Sphere Insurance Co. Ltd. B ACC.
Sphere Insurance Company Ltd. B A/C
Standard Chartered Insurance Brokers (Singapore) Ltd.
Stone, Pigman, Walther, Wittmann & Hutchinson
Storebrand Insurance Co. (UK) Ltd.
Storebrand Ltd.
Suwannee River Chartering, Inc.
Suwannee River Lines, Inc.
Suwannee River Phosophate Lines, Inc.
Suwannee River SPA Lines, Inc.
Switzerland General Ins. Co. (London) Ltd.
Taisho M. Insurance Co. (UK) Ltd.
Taisho Marine & Fire Insurance Co. (UK) Ltd.
The Drake Insce Co. Ltd.
The London Assurance
The Netherlands Insurance Co.
The Nippon Fire & Marine Insurance Co. (UK) Ltd.
The Threadneedle Insurance Co. Ltd.
The Tokio Marine & Fire Insurance Co. (U.K.) Ltd.
The Tokio Reinsurance Co. (UK) Ltd.

The Yasuda Fire & Marine Ins. Co. (U.K.) Ltd.
Thuringia Versicherungs Aktiengesellschaft
Tollenaar and Welsener
Travelers Insurance Company
Unigard Mutual Insurance Co.
Unione Italiana Reinsurance of America
United Americas Insurance Co.
United States Fidelity and Guaranty Co.
Vesta Bergen
Vesta (UK) Insurance Company Ltd.
VMW Industries, Inc. (formerly Victoria Machine Works, Inc.)
Yasuda Fire & Marine Insurance Co. (UK) Ltd. T A/C

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Occidental Petroleum Corporation and the London Underwriters, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceedings on February 13, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 866 F.2d 752 (5th Cir. 1989). The Memorandum of Opinion of the District Court, the Court of Appeals' order remanding the case for reconsideration in light of *East River* and the District Court's opinion on remand are set forth in Appendices B, C and D, respectively.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 13, 1989 (Appendix E). Petitions for rehearing and rehearing *en banc* were denied on March 20, 1989 (Appendix F). This petition is sought, pursuant to 28 U.S.C. § 2101(c), within 90 days from the denial of the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2 of the United States Constitution provides:

> The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.

STATUTES INVOLVED

U.C.C. § 2-316(1). Exclusion or Modification of Warranties:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other;

> but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

U.C.C. § 2-719. Contractual Modification or Limitation of Remedy:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its

essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

STATEMENT OF THE CASE[2]

Occidental[3] instituted this suit for maritime tort and breach of contract against Avondale Shipyards, Inc. ("Avondale"), Ogden Corporation ("Ogden"), guarantor and former parent of Avondale, Seabulk Transmarine I, Inc., Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping,

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[2] This statement is limited to the parties and facts necessary to the presentation and argument of the issues raised in the Petition for Writ of Certiorari.

[3] The parties, collectively referred to as Occidental, are: Suwannee River Lines, Inc., Suwannee River SPA Lines, Inc., Suwannee River Phosphate Lines, Inc., the bareboat charterer, respectively, of the OXY TRADER, the OXY PRODUCER, and the OXY GROWER; Suwannee River Chartering, Inc., the time charterer of the ships; Occidental Export, Inc., the seller of certain chemicals transported by the ships; Occidental Chemical Agricultural Products, Inc.; Occidental Petroleum Corp., the parent corporation of all of the preceding parties; and the London Underwriters subscribing to Certificate Nos. 14880, 14882, and 14888.

Inc. (collectively referred to as "Hvide"), supervisors of the construction of the OXY PRODUCER (the "Vessel"), to recover, *inter alia*, the purchase price of the Vessel, which was destroyed due to the sinking and total loss of its tug, together with the crew's effects thereon, within three and one-half months from the date of delivery.

Following trial, limited to the issue of liability, the district court found that the tug sank as a result of the improper mating of the tug and barge, which rendered the Vessel unseaworthy upon delivery, and that the improper mating constituted both a breach of Avondale's express warranty to construct a seaworthy vessel and a breach of Hvide's express warranty to supervise the construction of the Vessel to ensure that it was seaworthy when delivered to Occidental. Accordingly, the district court held that Avondale and Hvide were liable to petitioner for breach of contract and, further, that Hvide was liable in tort for the negligent performance of its contract.

Appeals were taken by Occidental, Avondale, Ogden and Hvide. Pending the original appeals and prior to oral argument, this Court decided the *East River* case. The Fifth Circuit remanded the case to the district judge for reconsideration in light of that case. The supplemental opinion, issued following that remand, found the original opinion as to liability was consistent with and supported by *East River*. Following resubmission of the appeal, the Fifth Circuit "affirme[d] the district court's holding that the [V]essel was improperly mated and unseaworthy on delivery and

that this was the sole cause of the damage to the [V]essel and the loss of the tug" (866 F.2d at 755). However, reversing the district court, the Fifth Circuit held that the express warranty of seaworthiness had been "subsumed" in the Guarantee Deficiency clause of the Avondale Construction Contract and, although acknowledging the impossibility of actual repairs, limited Occidental's recovery to "the cost of repairing or replacing deficiencies in the contract work" (*Id.*). The Fifth Circuit further held that *East River, supra*, precluded petitioner's tort recovery for Hvide's negligent performance of the Supervision Contract.

Occidental's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied.

REASONS FOR GRANTING THE WRIT

Occidental's petition for certiorari should be granted for the reasons, *inter alia*, that the Fifth Circuit (1) misinterpreted or misapplied *East River* by extending that decision to exonerate a provider of professional services from tort liability for the negligent performance of its contract and (2) interpreted the Construction Contract in disregard of the applicable provisions of the Uniform Commercial Code.

1.

East River **Does Not Confer Tort Immunity on a Provider of Professional Services**

The Fifth Circuit explicitly recognized that "[p]rior to *East River*, plaintiffs' negligence claims were, under the law of this circuit, clearly cognizable in

maritime tort. *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171, 175-76 (5th Cir. 1975)" and that "*this case raises an issue of first impression*: Does the *East River* economic loss rule apply to contracts for professional services, rendered in connection with the manufacture or construction of a product, by a party other than the builder or manufacturer?" (866 F.2d at 755)(Emphasis supplied). However, ignoring the dissimilar factual and legal issues presented by this case, the Fifth Circuit extended *East River* so as to confer tort immunity on Hvide, a provider of professional services only.

Occidental, unlike the purchaser in *East River*, was not content to rely solely on Avondale, the shipbuilder, for compliance with the plans and specifications of the Construction Contract. Rather, to ensure the construction and delivery of a seaworthy vessel, petitioner contracted for the supervisory services of Hvide, which, "because of [its] familiarity with the design of the Catug and . . . operation of existing Catug vessels . . . possess[ed] certain technical data and know how that is unique in the maritime industry."[4] Both Avondale and Hvide expressly warranted that the OXY PRODUCER would be seaworthy upon delivery. Both breached their express warranties. The tug sank less than four months following the delivery of the Vessel.

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[4] Supervision Contract, p. 3.

The Fifth Circuit acknowledged that *East River* was not dispositive of petitioner's right to recover in tort against Hvide but concluded, nevertheless, that no tort remedy was available against Hvide, because "[t]o hold otherwise would allow a plaintiff who contracts separately for 'services' related to the manufacturing process -- such as the design of the product or the supervision of the contract work -- to recover in tort for purely economic losses from the provider of those services while *East River* would bar any similar recovery in cases in which those same services are performed by the manufacturer itself" (866 F.2d at 766).

The Fifth Circuit's conclusion is clearly erroneous. There is no sound reason, legal or otherwise, that a purchaser who enters into two separate contracts to adequately protect its interests should be denied any rights flowing from the second contract. The only reason that petitioner or, for that matter, any other business entity would contract separately and at considerable additional expense for the supervision of a Construction Contract is not to avoid application of the *East River* holding (which had not even been rendered), but to protect itself against faulty performance by the manufacturer. Unfortunately for Occidental, neither the manufacturer nor the supervisor fulfilled their legal obligations.

Absolving Hvide from tort liability in this factual setting is not justified by *East River*, which stands for one principle and one principle alone: that

". . . a manufacturer in a commercial relationship has no duty under a negligence or strict products liability theory to prevent a product from injuring itself" (476 U.S. at 871). Thus, *East River* is limited to a purchaser's action against a manufacturer, in which the purchaser is entitled to all of the remedies afforded by the U.C.C. (476 U.S. at 872-74). In contrast, as the Fifth Circuit acknowledged, the U.C.C. does not apply to contracts for professional services (866 F.2d at 763); *see also, Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier*, 101 Misc.2d 371, 420 N.Y.S.2d 999, 1002 (1979).

Consequently, unlike the purchaser in *East River*, Occidental cannot claim any remedies or warranties under the U.C.C. as against Hvide, which did not manufacture any part of the OXY PRODUCER. To extend the *East River* holding, so as to deny a claim against Hvide for its negligence, is particularly egregious in view of the fact that the Hvide contract was negotiated at a time when *Jig the Third, supra*, afforded Occidental a remedy under both contract and tort.[5]

The Fifth Circuit recognized that a contract which was predominantly for services may be excepted from the purview of *East River* (866 F.2d at 761, fn.28), but refused to follow the cases so holding. *See Consolidated Edison Co. v. Westinghouse Elec. Corp.*,

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[5] In apparent recognition of the fact that it had the protection of the U.C.C. as against Avondale, Occidental waived any tort remedy in the Construction Contract, but retained such a remedy in the Supervision Contract with Hvide.

567 F.Supp. 358 (S.D.N.Y. 1983); *LaRossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968); *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979); *Pepsi Cola Bottling Co. v. Superior Burner Service Co., Inc.*, 427 P.2d 833 (Alaska 1967); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 74 N.E. 441 (1931); *Rosos Litho Supply Corp. v. Hansen*, 123 Ill. App.3d 290, 462 N.E.2d 566 (1st Dist. 1984).

While there are cases to the contrary, *e.g.*, *Flintkote Corp. v. Dravo Corp.*, 678 F.2d 942 (11th Cir. 1982); *PPG Industries, Inc. v. Sundstrand Corp.*, 681 F.Supp. 287 (W.D. Pa. 1988), the better reasoned cases preserve the distinction between contracts for the manufacture of goods, which are governed by the U.C.C., and those for professional services in which recovery for negligent performance has been traditionally allowed. Occidental contends that the Supervision Agreement was a contract exclusively for Hvide's professional services and that *East River* does not and should not extinguish its maritime tort claim against Hvide, especially in view of the loss of "other property" caused by Hvide's fault.

Because trial of liability and damages was bifurcated, Occidental has had no opportunity yet to present proof of the loss of the crew's effects, which exceeded some $28,000.00. However, to determine Hvide's liability, in light of East River, this loss should have been considered, because it clearly constitutes "other property" within the meaning of that case.

2.

Limiting a Purchaser's Remedy For Breach of an Express Warranty to a Physically Impossible Remedy Violates Sections 2-316(1) And 2-719(2) of The U.C.C.

This Court, in *East River*, held that "the Uniform Commercial Code which has been adopted by forty-nine States [applies]" to warranty claims grounded in vessel construction contracts (476 U.S. 873, n.7). New York is one of these forty-nine states.[6] The Avondale Construction Contract is controlled by the laws of that state. Therefore, the Avondale contract must be interpreted by reference to the pertinent provisions of the U.C.C. and with a view to achieving and maintaining the uniform application of that Code.

The Fifth Circuit held that the tug sank as a result of Avondale's breach of its express warranty of seaworthiness and that the tug could not be repaired, but concluded that, under Article XVIII(g) of the contract, Occidental's recovery was restricted to the "repair and replacement" of the defective workmanship which caused the sinking, because the express

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[6] New York, Uniform Commercial Code, Sections 1-101 *et seq* (McKinney 1964). As did this Court in *East River*, New York courts have applied the U.C.C. to contracts for construction of vessels. *Silver v. Sloop Silver Cloud*, 259 F.Supp. 187 (S.D.N.Y. 1966).

warranty had been "subsumed" in the Guarantee Deficiency Clause[7] of the contract (866 F.2d at 775).

The Fifth Circuit's decision ignores the pertinent provisions of the U.C.C., Sections 2-316(1) and 2-719(2), and destroys the very uniformity that the U.C.C. was designed to achieve.

Section 2-316(1) provides:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

This language has been uniformly construed as requiring an express, rather than an implied, disclaimer of an express warranty. *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 416 A.2d 394, 399 (1980)

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[7] "Guarantee Deficiency" is defined in the Occidental-Avondale Contract as: [A]ny weakness, deficiency, failure, breaking down or deterioration in workmanship or material produced or furnished by the Contractor in performing the Contract work or any failure of any equipment, machinery or material produced or furnished by the Contractor to function as prescribed by the Vessel Plans and Specifications."

(it is inconceivable that a disclaimer or limitation of an express warranty which is other than clear and conspicuous could be regarded as valid and enforceable); *Ford Motor Co. v. Reid*, 250 Ark. 176, 184, 465 S.W.2d 80, 85 (Ark. 1971) (limitations which are exclusive must be clearly stated to be such); *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 434, 347 A.2d 253, 258, 262 (Ct. Spec. App. 1975) (express warranties cannot be later negated).

Moreover, U.C.C. Section 2-316(1) precludes the seller from disclaiming its express warranties. "If the fact finder determines that a seller's statement creates an express warranty, words purportedly disclaiming that warranty will have no effect, for the disclaiming language is inherently inconsistent." J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*, 430 (2d ed. 1980).

The only provision relating to any disclaimer of warranties, Article XVIII(g) of the Avondale Contract, does not even mention the warranty of seaworthiness. It provides:

> The warranties and guarantees set forth in Article VIII, relating to speed, fuel consumption, SPA carrying capacity and deadweight tonnage, in this Article XVIII, relating to any guarantee deficiency and in Article XXXVIII relating to design responsibility for the barge, are

> exclusive and are in lieu of all implied warranties (including but not limited to any implied warranties of merchantability, fitness for a particular purpose and workmanlike service.)

In sum, nowhere in the contract are there any "words purportedly disclaiming" the express warranty of seaworthiness. Consequently, there are no inconsistencies which would require reconciliation. Notwithstanding, the Fifth Circuit excised the express warranty of seaworthiness from the Avondale contract on the theory that it had been "subsumed" in the Guarantee Deficiency clause (866 F.2d at 775).

The Fifth Circuit's theory is unsound and ignores the mandate of Section 2-316(1) that the warranty and the limitation clause "shall be construed wherever reasonable as consistent with each other." This can be done readily by enforcing the "repair and replace" clause for guarantee deficiencies and permitting recovery, as provided in the U.C.C., for the breach of the express warranty to deliver a seaworthy vessel. The Fifth Circuit's interpretation limits Occidental to a fictitious remedy, because the sunken unseaworthy tug is totally lost and the defective workmanship, i.e., the improper mating of the tug and barge, can neither be "repaired nor replaced."

If, as the Fifth Circuit held, Occidental's exclusive remedy is that of "repair and replacement" of

the defective workmanship, then surely the remedy failed of its essential purpose within the meaning of Section 2-719(2) of the U.C.C. which provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in [the Code]."

As reflected in its heading,[8] Article XVIII, which contains the "repair and replacement" provision, is limited to Avondale's obligation to repair and replace deficiencies in parts or workmanship discovered within a one-year period. It does not address Avondale's liability for the sinking of the tug resulting from the breach of the warranty of seaworthiness. The Fifth Circuit allowed that "a deficiency that causes the vessel to be unseaworthy may be more serious than one that does not" (866 F.2d at 766), but made no distinction between guarantee deficiencies susceptible to repair and replacement and unseaworthiness resulting in total loss. The total destruction or loss of a product is generally considered to be the classic example of the failure of the essential purpose of the repair and replacement remedy and cited as such:

> There are probably relatively few situations where a remedy can fail of its essential purpose. . . For example, suppose an automobile manufacturer limits remedy to repair and replacement of defective parts if such

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[8] Guarantee Period - Liability for Deficiencies.

> parts are delivered to its plant. If the entire car is destroyed as a result of defective wiring, the buyer would be unable to return the wiring to the manufacturer's plant. Even if the buyer could return the defective parts, repair or replacement would not restore the car to working condition. The exclusive remedy would therefore fail of its essential purpose.
>
> J. White & R. Summers, Uniform Commercial Code at 600 (3d ed. 1988)

In *Rudd Construction Equipment Co. v. Clark Equipment Co.*, 735 F.2d 974 (6th Cir. 1984), the court allowed the buyer to recover the net purchase price of the entire machine under a breach of warranty theory, where a defective hydraulic hose leaked, causing destruction of the entire tractor. Both the buyer and seller possessed relative parity of bargaining power and had, in fact, contractually limited the manufacturer's liability to the "repair or replacement" of the product. The court stated: "[O]n the other hand, the fact that the hose was defective was not discovered in time for Clark to have had an opportunity to replace it. Beyond that, replacement of the ruptured hose would obviously have been 'fruitless' in view of the near total destruction of the entire unit." *Id.* at 980. Based upon this rationale, the court held that the "repair or replace" language in the contract ". . . failed of its

essential purpose, especially since the defective part was small, and the defect resulted in the immediate destruction of the entire tractor shovel." *Id.* at 982.

There can hardly be a more compelling case than the instant one to demonstrate the failure of the essential purpose of a contract. The tug sank on September 20, 1981 and has been lying on the bottom of the Atlantic Ocean since that time. The repair and replacement remedy, if literally applied, would entail the raising of the tug, its repair, and its re-mating with the barge. The Fifth Circuit recognized that the remedy of *actual* repair would be ineffective (866 F.2d at 779). However, apparently relying only on Avondale's argument that "because the design for the OXY PRODUCER was relatively novel, it was willing to assume only the most limited liability for possible defects" (*Id.*), it concluded that Occidental assumed the risk of damage stemming from the breach of the express warranty of seaworthiness. This conclusion is bottomed on the false premise that the warranty is extinguished by or, in the Fifth Circuit's words, is "subsumed" in the Guarantee Deficiency clause. The Fifth Circuit thus reached the incongruous result that, notwithstanding the express warranty of seaworthiness negotiated by the parties, Occidental assumed the risk that the warranty would be breached and that such a breach would result in the total loss of the vessel. If Occidental had intended to assume that risk, certainly it would not have bargained for an express warranty of

seaworthiness and a limited disclaimer clause, only to be deprived of its remedy for breach of the warranty by a surreptious disclaimer derived from a contrived interpretation of the Guarantee Deficiency clause.

The repair and replacement remedy if it is, in fact, the exclusive remedy, fails of its essential purpose, which was to give Occidental what it bargained for: a seaworthy vessel. The Fifth Circuit's decision, which excised the express warranty of seaworthiness from the contract and limited Occidental's recovery for the breach thereof to a meaningless remedy, is contrary to Sections 2-316(1) and 2-719(2) and fails to abide by the principle, embodied in Section 2-719 that "it is of the very essence of a sales contract that at least minimum adequate remedies be available."

When a limited repair remedy fails of its essential purpose, plaintiffs are entitled to pursue those remedies provided in other sections of the U.C.C. *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1370 n.6 (8th Cir. 1977); *Koehring Company v. A.P.I., Inc.*, 369 F.Supp. 882, 886-92 (E.D. Mich. 1974); *Beal v. General Motors Corp.*, 354 F.Supp. 423, 425-28 (D. Del. 1973); *Cayuga Harvester v. Allis-Chalmers Corp.*, 95 A.D.2d 5, 465 N.Y.S.2d 606, 612 (A.D. 4 Dept. 1983) ("[A] finding that a limited warranty has failed of its essential purpose frees the buyer to pursue his remedy under other provisions of the Uniform Commercial Code as if the clause did not exist"). Remedies available under other provisions of the Code include return of the purchase price and consequential damages (U.C.C. § 2-719).

CONCLUSION

This cases raises an issue of first impression regarding the applicability of this Court's decision in *East River* to contracts for professional services. This issue was erroneously decided by the Fifth Circuit, based upon its misinterpretation of *East River*, and should be rectified to prevent further misinterpretations of that decision by other district or appellate courts.

Further, the Fifth Circuit's decision limiting Occidental's recovery for the breach of the warranty of seaworthiness to the physically impossible "repair and replacement" of defective workmanship on a sunken vessel violates Sections 2-316(1) and 2-719(2) and fails to grant Occidental "at least minimum adequate remedies" as mandated by Section 2-719. Specifically, the official comment to McKinney's Consolidated Law, Uniform Commercial Code § 2-719, states:

> ". . . [H]owever, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."

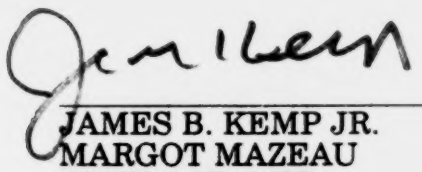
The Fifth Circuit's adoption of Avondale's interpretation of Article XVIII of the contract so as to delete therefrom the express warranty of seaworthiness

was the very interpretation which the district court had properly rejected for the reasons, among others, that "Avondale's reading of the contract would lead to the absurd result that if a defective $1.00 part had caused [the Vessel] to be unseaworthy and sink, Avondale would only have been obligated to replace that $1.00 part." (Appendix B, p. 50a).

The Fifth Circuit not only reached the "absurd result", which the district court refused to reach, but criticized it for having "engage[d] in a tortured interpretation of the contract" (866 F.2d at 776). Occidental submits that it was not the district court, but the Fifth Circuit, which engaged in a tortured interpretation in disregard of the pertinent provisions of the Uniform Commercial Code, which governs the Construction Contract.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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